

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF IOWA  
CENTRAL DIVISION**

---

LUCAS HERNANDEZ,  
Plaintiff,

vs.

BRIDGESTONE AMERICAS TIRE  
OPERATIONS, LLC,  
Defendant.

---

No. 4:13-cv-00374

**ORDER**

Plaintiff, Lucas Hernandez, brought this action against his former employer, Bridgestone Americas Tire Operations (“BATO”), under the Family Medical Leave Act (“FMLA”). The Court granted Plaintiff’s motion for summary judgment, finding that Defendant violated the FMLA by terminating Plaintiff’s employment because it miscalculated Plaintiff’s available FMLA leave. Following a trial on damages, the jury returned a verdict in the amount of \$75,681 on Plaintiff’s FMLA interference claim. Thereafter, the parties presented evidence to the Court regarding equitable relief.

This matter comes before the Court pursuant to Plaintiff’s motion for liquidated damages and reinstatement. Plaintiff asks the Court to award Plaintiff liquidated damages and reinstate Plaintiff to his position as a tire builder at BATO. Alternatively, Plaintiff requests that if the Court does not reinstate Plaintiff, it award Plaintiff front pay as would be appropriate. Defendant argues that Plaintiff is not entitled to liquidated damages, reinstatement, or front pay.

**I. BACKGROUND**

Plaintiff began working for Defendant in November, 2003, and bid into a tire builder position one year later. Plaintiff continued to work as a tire builder for the remainder of his tenure with Defendant. Plaintiff was fired in August, 2012, for violations of Defendant’s attendance policy. Specifically, Defendant terminated Plaintiff’s employment because Plaintiff had volunteered for, was selected for, and then missed overtime shifts for FMLA-qualifying reasons.

Following his termination, Plaintiff brought an action against Defendant for FMLA violations, alleging Defendant failed to provide Plaintiff with the appropriate FMLA leave, interfered with Plaintiff’s right to take FMLA leave, discriminated against Plaintiff for utilizing

FMLA leave, and retaliated against Plaintiff for utilizing FMLA leave. On December 12, 2014, Judge Longstaff granted in part both parties' motions for summary judgment. Judge Longstaff held that Plaintiff was entitled to recover as a matter of law on his claim of FMLA interference resulting from Defendant's misinterpretation of whether Plaintiff's overtime shifts qualified as voluntary under the FMLA. Judge Longstaff limited trial to the amount of Plaintiff's damages as a result of his termination and any available equitable relief, including reinstatement, and dismissed Plaintiff's remaining claims. A jury trial was held on the issue of backpay on January 12, 2015, and a bench trial on the issue of equitable remedies followed on January 13, 2015. The instant order deals with Plaintiff's request for equitable remedies.

## **II. LIQUIDATED DAMAGES ANALYSIS**

Any employer found to have violated the FMLA "shall be liable" to the affected employee for lost wages, interest, and "an additional amount as liquidated damages equal to the sum of the amount" of lost wages and interest. 29 U.S.C. § 2617(a)(1). "Liquidated damages are considered compensatory rather than punitive in nature." *Thorson v. Geminin, Inc.*, 96 F. Supp. 2d 882, 890–91 (N.D. Iowa 1999) *aff'd sub nom.* 205 F.3d 370, (citing *Roy v. Cnty. of Lexington, S.C.*, 141 F.3d 533, 548 (4th Cir. 1998); *Reich v. S. New England Telecommns. Corp.*, 121 F.3d 58, 71 (2d Cir. 1997)). Liquidated damages are not a disfavored penalty; they are "the norm, not the exception." *Id.* (citing *Shea v. Galaxie Lumber & Constr. Co., Ltd.*, 152 F.3d 729, 733 (7th Cir. 1998)). "[T]here is a strong presumption in favor of doubling." *Id.*

An employer may overcome this presumption in favor of liquidated damages when it "proves to the satisfaction of the court that the act or omission which violated [the FMLA] was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation. . . ." 29 U.S.C. § 2617(a)(1)(iii). When the employer establishes this good faith defense, it is within a court's discretion to "reduce the amount of liability to the amount and interest determined," in this case, by the jury. 29 U.S.C. § 2617(a)(1)(iii). "In order to avoid liquidated damages, the employer bears a plain and substantial burden to persuade the court that the failure to obey the statute was both in good faith and predicated upon such reasonable grounds that it would be unfair to impose upon him more than a compensatory verdict." *Thorson*, 96 F. Supp. 2d at 891.

The language of the FMLA indicates that the good faith defense is an affirmative defense. *See Twigg v. Pilgrim's Pride Corp.*, 2007 WL 676208, at \*6 (N.D.W.V. March 1, 2007)

(information relevant “because of the affirmative defense of good faith compliance with the FMLA”); *Hayduk v. City of Johnstown*, 580 F. Supp. 2d 429, 482 n.45 (W.D. Penn. 2008) (liquidated damages provision of FMLA contains “the affirmative defense of the actor’s good faith reasonable belief in the non-violative nature of his actions”). To the extent that there is any question whether this is an affirmative defense, an analogy to the Fair Labor Standards Act (“FLSA”) is helpful. The FLSA contains a nearly identical good faith defense to liquidated damages. 29 U.S.C. § 216(b). Courts have held that this nearly identical good faith defense is an affirmative defense in context of the FLSA. *See Hertz v. Woodbury Cnty., Iowa*, 566 F.3d 775, 783 (8th Cir. 2009) (“The Supreme Court has indicated that the general rule is that the application of an exemption under the FLSA is a matter of affirmative defense on which the employer has the burden of proof.”); *Bouchard v. Regional Governing Bd.*, 939 F.2d 1323, 1327–29 (8th Cir. 1991) (characterizing good faith defense under FLSA § 259 as affirmative defense); *Herman v. Palo Grp. Foster Home, Inc.*, 183 F.3d 468, 474 (6th Cir. 1999) (“The Portal-to-Portal Act provides a limited affirmative defense to the [FLSA] liquidated-damages provision.”); *Cole v. Farm Fresh Poultry, Inc.*, 824 F.2d 923, 925 (11th Cir. 1987) (Defendant “also raised an affirmative defense, claiming that it qualified for the ‘good faith’ exemption of 29 U.S.C. § 259”). Therefore, the Court finds that the FMLA good faith defense to liquidated damages is an affirmative defense.

Generally, failure to plead an affirmative defense results in the waiver of that defense. FED. R. CIV. P. 8(c). This pleading requirement is intended to give the opposing party both notice of the affirmative defense and an opportunity to rebut it. *First Union Nat’l Bank v. Pictet Overseas Trust Corp., Ltd.*, 477 F.3d 616, 622 (8th Cir. 2007) (citing *Grant v. Preferred Research, Inc.*, 885 F.2d 795, 797–98 (11th Cir. 1989)). Here, Defendant failed to plead the good faith affirmative defense. However, the Eighth Circuit has “eschewed a literal interpretation of the rule that places form over substance . . . and instead held that [w]hen an affirmative defense is raised in the trial court in a manner that does not result in unfair surprise, . . . technical failure to comply with Rule 8(c) is not fatal.” *Id.* (internal citations omitted) (internal quotation marks omitted). The Court finds that Plaintiff is not unfairly prejudiced in these circumstances by Defendant’s failure to plead this affirmative defense. Plaintiff was able to present evidence rebutting Defendant’s good faith defense at trial. The Court therefore considers Defendant’s good faith defense arguments. *See id.* (finding no unfair surprise or prejudice resulting from failure to plead defense and considering assertions of defense as “constructively amending” pleadings).

Defendant produced ample evidence that Defendant subjectively believed it was following the law through its Division Human Resources Manager, Jim Funcheon. In fact, Funcheon seemed to maintain that Defendant was following the law despite Judge Longstaff's order otherwise, and testified at trial that he continued to view overtime shifts as mandatory once assigned—not voluntary. However, Defendant's subjective belief is not sufficient to establish the good faith defense. Defendant also bears the "plain and substantial burden to persuade the court that the failure to obey the statute was . . . predicated upon such reasonable grounds that it would be unfair to impose upon him more than a compensatory verdict." *Thorson*, 96 F. Supp. 2d at 891. "Good faith requires more than a showing of ignorance of the prevailing law or uncertainty about its development. It is not enough to show that a violation was not purposeful. . . . Good faith requires that an employer first take active steps to ascertain the dictates of the law and then move to comply with them." *Id.* (citing *Reich*, 121 F.3d at 71).

Evidence that Defendant took "active steps to ascertain the dictates of the law" is sparse. Funcheon testified that he did not look at the FMLA regulations to determine if BATO's FMLA leave calculations were accurate. Funcheon testified that he did not seek out any opinion letters to assist in determining whether Defendant's FMLA calculations were accurate. Funcheon testified that he did not consult a lawyer about whether he was accurately calculating voluntary overtime hours. Funcheon testified that he reviewed Plaintiff's absences and Defendant's policy, but did not review the FMLA regulations in determining whether he could legally terminate Plaintiff's employment. Trial Transcript Day 2 ("Tr. Trans. 2") P. 157–60. Though Funcheon testified that he has been trained on FMLA issues and worked in Human Resources for thirty years, he did little legal investigation in this case.

Defendant argues that even if Defendant had looked into the state of the law, Defendant would have arrived at the same conclusion because there was no indication that overtime shifts in circumstances similar to those at BATO are considered voluntary under the FMLA. Judge Longstaff's order relied on both the plain language of the FMLA and a 1999 Opinion Letter in finding the overtime shifts in question voluntary. Defendant had both the plain language of the statute and the 1999 Opinion Letter available to it at the time Defendant terminated Plaintiff's employment. Defendant agreed that these overtime hours were not part of Plaintiff's usual and normal workweek. Defendant also did not include these overtime shifts in determining employee's annual FMLA allotment. Here, Defendant admits that it did essentially no legal research regarding

whether these overtime shifts were voluntary. Judge Longstaff relied on information available to Defendant at the time it terminated Plaintiff in finding that these shifts were not voluntary. Defendant has failed to meet its “plain and substantial burden to persuade the court that the failure to obey the statute was both in good faith and predicated upon such reasonable grounds that it would be unfair to impose upon him more than a compensatory verdict.” *Thorson*, 96 F. Supp. 2d at 891. Therefore, the Court awards liquidated damages in the amount of the jury verdict, in this case \$75,681.00.

### III. REINSTATEMENT ANALYSIS

Reinstatement is an equitable remedy the Court may award in its discretion. *See Sellers v. Mineta*, 358 F.3d 1058, 1063 (8th Cir. 2004) (“Front pay is a disfavored remedy that may be awarded in lieu of reinstatement, but not in addition to it, where the circumstances make reinstatement impractical.”) In determining whether reinstatement is appropriate, the Court considers the following factors:

(1) Whether the employer is still in business; (2) whether there is a comparable position available for the plaintiff to assume; (3) whether an innocent employee would be displaced by reinstatement; (4) whether the parties agree that reinstatement is a viable remedy; (5) whether the degree of hostility or animosity between the parties—caused not only by the underlying offense but also by the litigation process—would undermine reinstatement; (6) whether reinstatement would arouse hostility in the workplace; (7) whether the plaintiff has since acquired similar work; (8) whether the plaintiff’s career goals have changed since the unlawful termination; and (9) whether the plaintiff has the ability to return to work for the defendant employer—including consideration of the effect of the dismissal on the plaintiff’s self-worth.

*Ogden v. Wax Works, Inc.*, 29 F. Supp. 2d 1003, 1010 (N.D. Iowa 1998) (internal citations omitted). These factors are to be considered along with “all relevant facts and circumstances presented in the case.” *Id.* (citing *Standley v. Chilhowee R-IV Sch. Dist.*, 5 F.3d 319, 322 (8th Cir. 1993)). It is undisputed that BATO is still in business and that the company still employs tire builders. Likewise, Plaintiff is able to return to work for Defendant, and in fact testified that he wishes to do so. Therefore, factors one, two, and nine clearly weigh in favor of reinstatement.

The Court’s analysis of factors two, three, and four depends on many of the same facts. Defendant presented testimony at trial that there are currently no available tire builder positions at BATO, that Defendant is not currently hiring hourly production employees, and that Defendant is in a voluntary lay-off period. Funcheon testified that, if reinstated, Plaintiff would displace a current tire-building employee. The fact that tire-building positions are filled by employees who

are “innocent” to the discrimination tips factor three in favor of denying reinstatement. *See Ogden*, 29 F. Supp. 2d at 1016 (citations omitted). However, the fact that Defendant would have to displace an employee in order to reinstate Plaintiff is only one factor and is not dispositive.

Defendant argues that Plaintiff’s repeated allegations of unlawful conduct establish that both parties would experience hostility in the workplace were the Court to reinstate Plaintiff. Some level of hostility is likely to result from any litigation. *See Taylor v. Teletype Corp.*, 648 F.2d 1129, 1139 (8th Cir. 1981). However, predictable hostility or discomfort resulting from litigation is not a sufficient reason to deny reinstatement. *Id.* (“[A] court might deny reinstatement in virtually every case if it considered the hostility engendered from litigation as a bar to relief.”). Funcheon testified that Plaintiff would not be in direct contact with many of the individuals Plaintiff specifically named when he alleged discrimination. Tr. Trans. 2 P. 167–70. Funcheon also testified that, while he suspected some employees may have known about Plaintiff’s naming of certain individuals in his lawsuit, he had not told anyone who was named specifically and had no knowledge of whether any employees, in fact, knew any details of Plaintiff’s lawsuit. *Id.* Furthermore, while Plaintiff may at times work on a two-person machine, there is no evidence in the record that Plaintiff works in a highly collaborative environment where personal dislike may interfere with the quality or efficiency of Plaintiff’s (or others’) work. *Cf. Coston v. Plitt Theatres, Inc.*, 831 F.2d 1321, 1330–31 (7th Cir. 1987), *cert denied*, 485 U.S. 1007, *vac’d on other grounds*, 486 U.S. 1020, *on remand*, 860 F.2d 834 (7th Cir. 1988) (finding reinstatement inappropriate when position filled and when position required “significant managerial, public responsibilities,” and when hostility may lead to public image issues due to the public nature of job duties). The Court finds that the degree of hostility in this case does not exceed that which is normally engendered between litigants as a byproduct of litigation.

Lastly, while Plaintiff has been able to secure other work since being terminated from his job at BATO, evidence does not establish that this work is “similar.” Evidence at trial established that Plaintiff was unable to secure a job with the same benefits he received at BATO. Plaintiff’s current employment also includes no benefits. Plaintiff’s ability to get another job does not establish that Plaintiff is not entitled to reinstatement. Though the Court finds that Plaintiff has been able to find other employment, the Court finds that Plaintiff’s ability to secure similar employment is neutral or weighs against reinstatement in this case. *See Henry v. Lennox Indus., Inc.*, 768 F.2d 746, 753 (6th Cir. 1985) (citing *Brito v. Zia Company*, 478 F.2d 1200, 1204 (10th

Cir. 1973)) (stating that reinstatement may be denied where “plaintiff has found other work or could have”).

Considering the circumstances as a whole, the Court finds that the evidence weighs in favor of reinstating Plaintiff to his position as a tire builder at BATO. While the Court understands Defendant’s concerns about hostility and litigiousness and acknowledges that there will be costs associated with Plaintiff’s reinstatement—including displacing an innocent employee—the Court finds that these costs do not rise to a level that would justify the Court’s declining to reinstate Plaintiff. The Court relies on Plaintiff’s testimony that he could comfortably return to work for Defendant, the speculative nature of any alleged future conflict, and Defendant’s agreement that Plaintiff exhibited no performance issues in determining that any hostility between the parties is mild and can be overcome. Plaintiff has established that reinstatement is in line with his career goals and would be able to return to his job without issue. Therefore, the Court orders that Defendant reinstate Plaintiff to his prior position within the company.

#### **IV. CONCLUSION**

Liquidated damages and reinstatement are both favored equitable remedies for an FMLA violation. Here, viewing the circumstances of this case as a whole, the Court finds it appropriate both to grant Plaintiff liquidated damages and to reinstate Plaintiff to his former position as a BATO tire builder. Upon the foregoing,

**IT IS ORDERED** that Plaintiff’s motion for liquidated damages and reinstatement is **GRANTED**. The clerk shall enter an amended judgment in the amount of \$75,681.00 compensatory damages and \$75,681.00 liquidated damages, plus attorneys’ fees and costs. Defendant shall reinstate Plaintiff within 30 days.

**DATED** this 17th day of March, 2015.

  
JOHN A. JARVEY  
UNITED STATES DISTRICT JUDGE  
SOUTHERN DISTRICT OF IOWA